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No. 01-6978 (3)

JAN 25 2002

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IN THE SUPREME COURT OF THE UNITED STATES

GARY A. EWING, *Petitioner,*

v.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does Petitioner's twenty-five year to life prison sentence violate the Cruel and Unusual Punishment Clause when Petitioner was convicted of grand theft, and his prior criminal history includes two violent felonies involving the use of a weapon, and two other serious felonies?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 01-6978

GARY A. EWING, *Petitioner,*

v.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent.*

OPINION OR JUDGMENT BELOW

Petitioner, Gary A. Ewing, seeks review of the judgment of the Court of Appeal of California, Second Appellate District in *People v. Ewing* (B143745), affirming his judgment of conviction. A copy of the court of appeal's opinion is attached as Appendix 1 to Petitioner's Petition for Writ of Certiorari. The California Supreme Court denied Petitioner's petition for review. A copy of the California Supreme Court's order is attached as Appendix 2 to Petitioner's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Following a jury trial in the Los Angeles County Superior Court, Petitioner was convicted of grand theft of

personal property.[1] Cal. Penal Code § 487(a). Petitioner waived his right to a jury trial regarding the prior conviction allegations. The trial court subsequently found that Petitioner had been convicted of one count of robbery, Cal. Penal Code § 211, and three counts of residential burglary, Cal. Penal Code § 459. The trial court found all four prior convictions were "strikes" within the meaning of California's Three Strikes Law, Cal. Penal Code §§ 667(b)-(i), 1170.12(a)-(d). The trial court also found true a prior prison term allegation, Cal. Penal Code § 667.5, regarding Petitioner's robbery conviction. (Petition, Appendix 1 (Opinion at 1).)

At sentencing, the trial court denied Petitioner's request to have his present conviction reduced to a misdemeanor, Cal. Penal Code § 17(b), and his request to dismiss his "strike" offenses in furtherance of justice, Cal. Penal Code § 1385. However, the trial court, in furtherance of justice, dismissed the one-year sentence enhancement for the prior prison term allegation. Pursuant to California's Three Strikes Law, Petitioner was sentenced to twenty-five years to life in state prison. (Petition, Appendix 1 (Opinion at 1-2).)

The California Court of Appeal, Second Appellate District, affirmed the judgment of the superior court. The court of appeal specifically found that: (1) the trial court properly acted within its discretion in refusing to reduce Petitioner's current offense to a misdemeanor; (2) the trial court properly acted within its discretion in refusing to dismiss the "strike" convictions in furtherance of justice; (3) Petitioner's sentence did not violate the federal and state prohibitions against cruel and/or unusual punishment; and there was sufficient evidence of Petitioner's prior convictions. (Petition, Appendix 1 (Opinion at 2-9).)

Petitioner filed a petition for review in the California Supreme Court arguing that his sentence violated the Eighth Amendment of the United States Constitution. The California

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1. The jury acquitted Petitioner of a charge of burglary. Cal. Penal Code § 459.

Supreme Court denied the petition for review. (Petition, Appendix 2.)

Petitioner filed his instant Petition for Writ of Certiorari in this Court on or about October 2, 2001.

STATEMENT OF FACTS

In March of 2000, Petitioner entered the Pro Shop at the El Segundo Golf Course located in El Segundo, California. He purchased a small bucket of golf balls to use at the course driving range, and looked at the golf clubs in the shop. As Petitioner subsequently exited the shop, a shop employee noticed Petitioner walking to the parking lot rather than the driving range. Petitioner also was limping. The employee called 911. A police officer thereafter saw Petitioner in the parking lot of the golf course. Petitioner withdrew three Calloway golf clubs from his pants. The police officer subsequently apprehended Petitioner. The shop employee later identified Petitioner as the person who limped from the shop, and he identified the clubs as belonging to the shop. Petitioner had not paid for the clubs and was not given permission to take the clubs. Each club was priced at $399. (Petition, Appendix 1 (Opinion at 2).)

SUMMARY OF REASON FOR DENYING PETITION

The instant Petition fails to raise an important and unsettled question of federal law because, in light of Petitioner's current offense and criminal history which includes two violent felonies which involved the use of a weapon, and two other serious felonies, Petitioner's current sentence of twenty-five years to life in state prison is not cruel and unusual punishment under the Eighth Amendment.

ARGUMENT

CERTIORARI IS NOT WARRANTED BECAUSE A PRISON SENTENCE OF TWENTY-FIVE YEARS TO LIFE FOR PETITIONER'S CURRENT OFFENSE AND HIS VIOLENT AND SERIOUS PRIOR CONVICTIONS IS NOT CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT

Petitioner contends that certiorari should be granted because the California Court of Appeal incorrectly found that Petitioner's sentence comported with the Eighth Amendment. (Pet. at 16-22.) Supreme Court Rule 10(b)(c) provides that a petition for writ of certiorari will be granted only for "compelling reasons" such as when a state court of last resort has decided an important federal question in a way that conflicts with the decision of . . . a United States court of appeals;" or when a state court "has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." In light of Petitioner's present offense and his substantial recidivism, the California Court of Appeal's rejection of Petitioner's Eighth Amendment claim does not conflict with the decisions of this Court or the Ninth Circuit Court of Appeals. Moreover, the case fails to present a question of federal law requiring settlement by this Court. Thus, the Petition should be denied.

A. The Evolution Of This Court's Recent Eighth Amendment Jurisprudence

The Eighth Amendment prohibits the infliction of cruel and unusual punishment. The Eighth Amendment applies to the states by virtue of the Due Process Clause of the Fourteenth Amendment. *See Robinson v. California*, 370 U.S. 660, 666 (1962). Starting in 1980, this Court has issued several decisions defining the proper scope of Eighth Amendment review of noncapital prison sentences.

In the first of these cases, *Rummel v. Estelle*, 445 U.S. 263 (1980), this Court gave the Eighth Amendment its narrowest construction. The petitioner in *Rummel* was convicted of obtaining $120.75 by false pretenses. He had two prior non-violent convictions. Pursuant to the state's recidivist law, the trial court sentenced the petitioner to life imprisonment with the possibility of parole. This Court found that the sentence did not violate the Eighth Amendment. *Id.* at 265-66, 285.

The *Rummel* Court found that "on occasion" this Court has "stated that the Eighth Amendment prohibits imposition of a sentence that it grossly disproportionate to the severity of the crime." *Rummel*, 445 U.S. at 272. However, "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." *Id.* at 272-73.

The *Rummel* Court found one example where this Court reviewed a non-capital sentence for proportionality. *Rummel*, 445 U.S. at 275. In *Weems v. United States*, 217 U.S. 349 (1910),[2] this Court found that because the petitioner was convicted of a relatively minor offense, the mode of his punishment, constant hard and painful physical labor, violated the Cruel and Unusual Punishment Clause. *Id.* at 357-82; *see Rummel*, 445 U.S. at 272-74.

This Court, in *Rummel*, was reluctant to, and refused to, review whether the length of the recidivist prison sentence

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2. *Weems* was the first case where this Court was called upon to define what constitutes a cruel and unusual punishment. *Weems*, 217 U.S. at 368-69.

imposed was disproportional. *Rummel*, 445 U.S. at 274.[3] Recognizing that Eighth Amendment review must be objective rather than subjective, *id.* at 275 (citing *Coker v. Georgia*, 433 U.S. 584, 592 (1977)), the *Rummel* Court found that in *Weems* it was possible to objectively review whether the mode of punishment was cruel and unusual in comparison to other punishments that have been imposed historically. However, "a more extensive intrusion into the basic line-drawing process that is pre-eminently the province of the legislature when it makes an act criminal" would lead to an impermissible subjective review. *Rummel*, 445 U.S. at 275. This Court, in *Rummel*, specifically rejected the petitioner's argument that objective proportionality review could occur by analyzing factors such as the defendant's lack of violence, the amount of property taken, and an inter-jurisdictional comparison of sentences for similar offenses. *Id.* at 275-82.

Two years after deciding *Rummel*, this Court reaffirmed *Rummel's* narrow construction of the Eighth Amendment in *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam). The petitioner in *Hutto* was convicted of possession of nine ounces of marijuana with intent to distribute and distribution of marijuana. The trial court sentenced the petitioner to two consecutive terms of twenty years

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3. In reference to the proportionality review conducted in *Weems*, the *Rummel* Court stated:

> Given the unique nature of the punishments considered in *Weems* and in the death penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.

Rummel, 445 U.S. at 274.

imprisonment. This Court found that the sentence did not violate the Eighth Amendment. *Id.* at 370-72.

This Court, in *Hutto*, severely chastised the lower court for conducting a proportionality review of the prison sentence by applying four factors[4] that had been disapproved in *Rummel*. *Hutto*, 454 U.S. at 372-73 (citing *Rummel*, 445 U.S. at 275-76). The *Hutto* Court stated that the lower court "could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress." The *Hutto* Court further stated that "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto*, 454 U.S. at 374-75.

One year after deciding *Hutto*, this Court turned significantly away from its narrow construction of the Eighth Amendment. In *Solem v. Helm*, 463 U.S. 277 (1983), the petitioner was convicted of uttering a "no account" check for $100. The petitioner's six prior convictions were non-violent. He was sentenced to life imprisonment without the possibility of parole. This Court found that the petitioner's sentence was disproportionate to his offense. *Id.* at 279-303.

Despite this Court's holding in *Rummel*, the *Solem* Court approved proportionality review of prison sentences and mandated consideration of "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Solem*, 463 U.S. at 292. The list of three mandatory factors was "by no means exhaustive." *Id.* at 294.

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4. The factors considered by the lower court were the element of violence in the offense, the purpose behind the state's sentencing law, an inter-jurisdictional comparison of sentences for the crime, and a comparison of the sentence with punishments for other offenses in the state. *Hutto*, 454 U.S. at 373 n.2.

Although the three mandatory factors had been rejected by the *Rummel* Court as leading to a subjective review of prison terms, *Rummel*, 445 U.S. at 275-82; *see Hutto*, 454 U.S. at 372-75, the *Solem* Court found that the test was "not inconsistent with *Rummel v. Estelle*." *Solem*, 463 U.S. at 303 n.32.

Seven years after deciding *Solem*, this Court retreated from *Solem*'s liberal construction of the Eighth Amendment. In *Harmelin v. Michigan*, 501 U.S. 957 (1990), the petitioner was convicted of possession of 672 grams of cocaine and sentenced to life imprisonment without the possibility of parole. Five justices found that the petitioner's sentence did not violate the Cruel and Unusual Punishment Clause. *Id.* at 961-1009.

In *Harmelin*, this Court continued its ongoing debate over the proper scope of Eighth Amendment review. Justice Scalia found that the Eighth Amendment was not intended to guarantee proportionality of prison terms. *Id.* at 965-85. Furthermore, he found that proportionality review is unworkable because "[w]hile there are relatively clear historical guidelines and accepted practices that enable judges to determine which *modes* of punishment are 'cruel and unusual,' *proportionality* does not lend itself to such analysis." *Id.* at 985 (original emphasis). Justice Scalia specifically found that the *Solem* proportionality test was impractical because application of its factors results in a subjective review of the sentence. Consequently, he found it necessary to overrule *Solem*. *Id.* at 985-90.

In sharp contrast, Justice White found historical precedent for a proportionality guarantee in the Eighth Amendment. *Harmelin*, 501 U.S. at 1009-15 (White, J., dissenting). Contrary to Justice Scalia's position regarding the impracticality of proportionality review, Justice White found that courts "appear to have had little difficulty" reviewing the length of a given sentence. *Id.* at 1015. Justice White also found that Justice Scalia failed to provide a "mechanism for addressing a situation" where a significantly long prison sentence is imposed for a very minor criminal offense. *Id.* at 1018. As for *Solem*, Justice White believed the three mandatory

factors set forth therein were practical and workable. Consequently, Justice White found "no justification for overruling or limiting *Solem*." *Id.* at 1021.

Striking a middle ground, Justice Kennedy bypassed the historical debate and found that the Eighth Amendment contained a "narrow proportionality principle." *Harmelin*, 501 U.S. at 996 (Kennedy, J., concurring) ("Regardless of whether Justice Scalia or Justice White has the best of the historical argument, [citations], *stare decisis* counsels our adherence to the narrow proportionality principles that has existed in our Eighth Amendment jurisprudence for 80 years"). Justice Kennedy recognized that the "precise contours" of the proportionality principle "are unclear." *Id.* at 998. The Eighth Amendment, however, "does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id.* at 1001 (quoting *Solem*, 463 U.S. at 288, 303).

Attempting to resolve the inconsistency caused by the *Solem*, *Hutto*, and *Rummel* decisions, Justice Kennedy articulated a new proportionality test. First, the reviewing court should perform a "threshold comparison" of the crime committed and the sentence imposed to determine if there is an inference of gross disproportionality. Only when such an inference arises, however, may the reviewing court engage in an inter-jurisdictional comparative analysis. *Harmelin*, 501 U.S. at 1004-05. Justice Kennedy found that such a test "neither 'eviscerate[s]' *Solem*, nor 'abandons[s]' its second and third factors, . . . and it takes full account of *Rummel* and [*Hutto*]." *Id.* at 1005. Because only Justices O'Connor and Souter joined Justice Kennedy's concurrence, *id.* at 996, his test was not accepted by a majority of this Court.

Since deciding *Harmelin*, this Court has twice denied petitions for writ of certiorari where the petitioner sought review of whether California's Three Strikes Law violates the Eighth Amendment. In the first of these cases, *Riggs v. California*, 525 U.S. 1114, 119 S. Ct. 890 (1999), the petitioner was convicted of petty theft with a prior conviction. The petitioner also had at

least two prior "strike" offenses under California's Three Strikes Law.[5] The petitioner was sentenced to twenty-five years to life in state prison. Had the petty theft offense been the petitioner's first offense, his sentence would have been no more than six months in county jail. 119 S. Ct. at 891.

Justice Breyer dissented from the denial of certiorari in *Riggs*. *Riggs*, 119 S. Ct. at 892 (Breyer, J., dissenting). Justice Stevens, with Justices Souter and Ginsberg concurring, stated that the case raised a "serious question concerning application of California's 'three strikes' law [citation] to petty offenses." *Id.* at 891. Certiorari was not yet necessary because "[n]either the California Supreme Court nor any federal tribunal ha[d] yet addressed the question." *Id.*

In the second case, *Durden v. California*, 531 U.S. 1184, 121 S. Ct. 1183 (2001), the petitioner also was convicted of petty theft and sentenced under California's Three Strikes Law to twenty-five years to life in prison. Justice Souter, with Justice Breyer concurring, dissented from the denial of certiorari, stating that the Eighth Amendment issues presented by California's Three Strikes Law were "substantial." Moreover, Justice Souter also believed that there is no longer good reason to postpone review of California's sentencing scheme because, in the two years following *Riggs*, the California Supreme Court and the Ninth Circuit Court of Appeals still had not yet reviewed the constitutionality of California's Three Strikes Law. 121 S. Ct. at 1183 (Souter, J., dissenting).

Although the California Supreme Court still has not yet granted review to consider whether California's Three Strikes Law comports with this Court's Eighth Amendment decisions, the Ninth Circuit recently addressed the issue on habeas corpus in *Andrade v. Attorney General of the State of*

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5. Only specific serious or violent felonies can be "strikes" under California's Three Strikes Law. Cal. Penal Code §§ 1170.12(b)(1), 667(d)(1); *see* Cal. Penal Code §§ 667.5(c) (violent felonies), 1192.7 (serious felonies).

California, 270 F.3d 743 (9th Cir. 2001).[6] The petitioner in *Andrade* was convicted of two counts of petty theft with a prior offense. The petitioner had five prior felony convictions, including three prior residential burglary convictions, and two prior misdemeanor convictions. The petitioner was sentenced to twenty-five years to life in prison for each count of petty theft, for a total of fifty years to life in prison. *Id.* at 748-49.

Because *Andrade* arose on federal habeas, the Ninth Circuit was required to apply the standard of review set forth in the Antiterrorism and Effective Death Penalty Act, Pub.L. No. 104-32, 110 Stat. 1214 (Apr. 24, 1996) (hereinafter the "AEDPA"). Consequently, the petitioner was entitled to habeas corpus relief for his Eighth Amendment claim only if the state court decision denying relief was "contrary to, or involve[d] an unreasonable application of, clearly established federal law as determined by" this Court. *Andrade*, 270 F.3d at 753 (quoting 28 U.S.C. § 2254(d)(1)).

The Ninth Circuit, in *Andrade*, reviewed this Court's decisions in *Rummel*, *Solem*, and *Harmelin* to determine this Court's "clearly established" principles regarding the Eighth Amendment. *Id.* at 754-58. The *Andrade* court found that, although *Rummel* and *Solem* remained good law after *Harmelin*, the proper scope of Eighth Amendment review of a prison sentence was stated in Justice Kennedy's plurality opinion in *Harmelin*. *Andrade*, 270 F.3d at 758, 766. The Ninth Circuit found support for its conclusion from the decisions of other lower federal courts. *Id.* at 754, 757 (citing cases). Applying Justice Kennedy's proportionality test, the Ninth Circuit found that the petitioner's sentence was grossly disproportionate to his petty theft offenses and therefore in violation of the Eighth Amendment. *Id.* at 758-66.

One judge dissented in *Andrade*, finding that in applying Justice Kennedy's proportionality test, the majority

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6. Counsel for Respondent has been informed that The Office of the California Attorney General will be filing a petition for writ of certiorari in this Court in *Andrade*.

engaged in an improper subjective evaluation of California's Three Strikes Law. *Id.* at 767-70 (Sneed, J., dissenting).[7] Judge Sneed also noted that "[i]n the wake of *Harmelin*, not a single court has struck down the sentence of an habitual offender on Eighth Amendment grounds." *Id.* at 770-71 (citing cases). He concluded that, because of the petitioner's substantial recidivism, the state court denial of petitioner's Eighth Amendment claim did not violate this Court's precedent. *Id.* at 771-72.

Thus, it appears that under the "current state" of this Court's Eighth Amendment cases, proportionality review of a prison sentence is proper. *Solem*, 463 U.S. at 284; *see Harmelin*, 501 U.S. at 996 (Kennedy, J., concurring); *id.* at 1013 (White, J., dissenting); *id.* at 1028 (Marshall, J., dissenting). However, the test for proportionality is not clearly established. The Ninth Circuit, and apparently other lower federal courts, have applied Justice Kennedy's test from *Harmelin* even though his opinion was not approved by a majority of this Court. *Andrade*, 270 F.3d at 754-66; *see Harmelin*, 501 U.S. at 996 (Kennedy, J., concurring).

The test formulated by Justice Kennedy applies the same factors used in *Solem*, but contrary to *Solem*, analysis of all of the factors is not mandatory. *Harmelin*, 501 U.S. at 1004-05 (Kennedy, J., concurring); *see Solem*, 463 U.S. at 292. As noted by Justice White in *Harmelin*, Justice Kennedy's test "eviscerate[s]" the *Solem* test, "leaving only an empty shell." *Harmelin*, 501 U.S. at 1018 (White, J., dissenting). Further clouding the state of the law is Justice Kennedy's statement that his test does not eviscerate or abandon the *Solem* test, and "takes full account" of *Rummel* and *Hutto*. *Id.* at 1005 (Kennedy, J., concurring).

Although the lack of clarity in this Court's Eighth Amendment precedent may present an important question of

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7. Judge Sneed concurred with the majority that the petitioner filed a timely notice of appeal. *Andrade*, 270 F.3d at 767.

federal law, certiorari is not necessary in this case. This case arises on direct appeal rather than on collateral review. Therefore, this Court would not have to address, as did the *Andrade* court, the apparent inconsistencies in *Rummel*, *Hutto*, *Solem*, and *Harmelin* and decide what has been the "clearly established" federal law regarding the Cruel and Unusual Punishment Clause before the California Court of Appeal affirmed Petitioner's conviction and sentence. 28 U.S.C. § 2254(d)(1). Moreover, as set forth below, Petitioner's sentence was not grossly disproportional to his current offense and criminal history regardless of which Eighth Amendment test is applied. Therefore, certiorari should be denied on this basis as well.

B. A Prison Sentence Of Twenty-Five Years To Life Is Not Disproportionate To Petitioner's Current Offense And Prior Serious And Violent Felony Convictions

Under California law, grand theft can be charged as either a felony or a misdemeanor. Cal. Penal Code §§ 484(a), 487; *see* Cal. Penal Code §§ 17(b), 489(b). Because Petitioner committed his current offense, grand theft, in a non-violent manner, his current offense is somewhat similar to the offenses committed by the petitioners in *Rummel*, *Hutto*, *Solem*, *Harmelin*, and *Andrade*.

Petitioner's criminal history, however, is distinguishable from those of the petitioners in *Rummel*, *Hutto*, *Solem*, *Harmelin*, and *Andrade* because Petitioner has two prior serious felony convictions and two prior violent felony convictions. The trial court found that between 1988 and 1993 Petitioner had nine prior convictions including a prior robbery conviction and three prior residential burglary convictions. The robbery and the residential burglary convictions were found to be "strike" offenses, and Petitioner was found to have used a

weapon in committing two of these "strike" offenses.[8] Up until the present life sentence, nothing deterred Petitioner from continuing his life of crime. (Petition, Appendix 1 (Opinion at 1-3, 6).)

The trial court denied Petitioner's request to reduce the current offense to a misdemeanor,[9] and refused to dismiss Petitioner's prior "strike" offenses in furtherance of justice.[10] (Petition, Appendix 1 (Opinion at 2-6).) Had either request been granted, Petitioner would have received a misdemeanor sentence, or a non-life felony sentence.

Petitioner was thirty-eight years old at sentencing. (Petition, Appendix 1 (Opinion at 2).) Consequently, he will be eligible for parole in 2025, when he is approximately sixty-three years old. Although Petitioner may be entitled to prison conduct credit, he must serve a minimum of 25 years before he is eligible for parole. *In re Cervera*, 24 Cal. 4th 1073, 1080, 16 P.3d 176 (2001).

Petitioner's sentence is constitutional under *Solem*. Although Petitioner's present conviction is not violent, like that of the petitioner in *Solem*, Petitioner's prior criminal history is

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8. Petitioner's prior "strike" convictions arose out out of a single trial. (Petition, Appendix 1 (Opinion at 3).)

9. In considering whether to reduce a felony offense to a misdemeanor, trial courts must be guided by the "individualized consideration of the offense, the offender, and the public interest . . . . " *People v. Superior Court (Alvarez)*, 14 Cal. 4th 968, 978, 928 P.2d 1171 (1997).

10. In deciding whether to dismiss a "strike" conviction, the trial court must consider "the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects." *People* v. *Williams*, 17 Cal. 4th 148, 161, 948 P.2d 429 (1998); *People* v. *Superior Court (Romero)*, 13 Cal. 4th 497, 530, n.13, 917 P.2d 628 (1996).

far more egregious than that of the *Solem* petitioner, because Petitioner previously committed two prior serious and two prior violent felonies. Moreover, Petitioner's sentence is less harsh than that in *Solem* because Petitioner will be eligible for parole after serving his minimum sentence of twenty-five years. *Solem*, 463 U.S. at 279-303.

Petitioner's sentence also is constitutional under Justice Kennedy's *Harmelin* test. Petitioner's criminal history is more egregious than that of the petitioner in *Harmelin* because Petitioner committed two prior serious and two prior violent felonies. Petitioner's sentence also is less severe than that imposed in *Harmelin* because Petitioner will be eligible for parole after serving his minimum term. *Harmelin*, 501 U.S. at 961-1009.

Even under *Rummel* and *Hutto*, which this Court still consider valid law, Petitioner's sentence is constitutional because Petitioner's criminal history includes two prior serious and two prior violent felonies. Petitioner also has failed to offer any sentencing factors other than those set forth in *Solem* or *Harmelin* that would allow this Court to objectively review the proportionality of his sentence. *Hutto*, 454 U.S. at 372-75; *Rummel*, 445 U.S. at 265-85.

Petitioner's sentence also is constitutional under *Andrade* because Petitioner's prior criminal history, unlike that of the *Andrade* petitioner, includes two prior serious and two prior violent felonies. *Andrade*, 270 F.3d at 748-49. Consequently, although Petitioner's present sentence for grand theft is lengthy, his record as a career criminal is equally lengthy, as well as dangerous. Therefore, his sentence of twenty-five years to life under California's Three Strikes Law is not cruel and unusual punishment.

CONCLUSION

The Petition for Writ of Certiorari presents no "compelling reasons" for granting certiorari in this case. Specifically, the rejection of Petitioner's Eighth Amendment claim by the California Court of Appeal does not conflict with the decisions of this Court or the Ninth Circuit Court of Appeals. Additionally, the present case fails to present a question of federal law requiring settlement by this Court. Accordingly, the Petition should be denied..

Dated: January 24, 2002.

Respectfully submitted,

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